UNITED STATES DEPARTMENT OF LABOR • OFFICE OF ADMINISTRATIVE LAW JUDGES

Whistleblower Newsletter Environmental Cases

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U.S. Department of Labor
Office of Administrative Law Judges
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John M. Vittone
Chief Judge

Thomas M. Burke
Associate Chief Judge
for
Black Lung and
Traditional

Highlights of this issue:

Procedure:

Weighing of evidence:

Non-discriminatory reason for adverse action:

• Going outside chain of command only unlawful where respondent had been unresponsive to safety concerns or where complainant reasonably feared reprisal. *Sayre v. Veco Alaska, Inc.*, ARB No. 03-069, ALJ No. 2000-CAA-7 (ARB May 31, 2005). [Page 6 and 8]

Protected activity:

• "Leeway for implusive behavior principle" does not apply to deliberate and reasoned sarcasm and satire. *Sayre v. Veco Alaska, Inc.*, ARB No. 03-069, ALJ No. 2000-CAA-7 (ARB May 31, 2005). [Page 5]

• Protected activity; government employee performing job duties related to the environment. *Sasse v. USDOL*, No. 04-3245 (6th Cir. May 31, 2005) (case below ARB No. 02-077, ALJ No. 1998-CAA-7). [Page 8]

• SWDA covers both environmental and occupational safety. *Hall v. United States Army Dugway Proving Ground*, ARB Nos. 02-108 and 03-013, ALJ No. 1997-SDW-5 (ARB Dec. 30, 2004). [Page 9]

Adverse action:

• DOL does not have the authority to second guess another agency's decision to revoke a security clearance. *Hall v. United States Army Dugway Proving Ground*, ARB Nos. 02-108 and 03-013, ALJ No. 1997-SDW-5 (ARB Dec. 30, 2004). [Page 9]

• Hostile work environment; requirement of reporting safety complaints through chain of command is not improper if the complainant remains free to report outside the chain of command. *Hall v. United States Army Dugway Proving Ground*, ARB Nos. 02-108 and 03-013, ALJ No. 1997-SDW-5 (ARB Dec. 30, 2004). [Page 11]

Covered employers/employees:

• Individuals -- liability depends on employment relationship with those individuals as respondent employers. *Powers v. Tennessee Dept. of Environmental & Conservation*, ARB Nos. 03-061 and 03-125, ALJ Nos. 2003-CAA-8 and 16 (ARB June 30, 2005). [Page 12]

• Office of the Inspector General - lack of supervisory control. *Fox v. U.S. Environmental Protection Agency*, 2004-CAA-4 and 10, 2005-CAA-6 (ALJ Mar. 1, 2005), *recon. denied* (ALJ Mar. 15, 2005). [Page 12]

Sovereign immunity:

• Amendment of complaint to add parties to avoid effects of state sovereign immunity. *Powers v. Tennessee Dept. of Environmental & Conservation*, ARB Nos. 03-061 and 03-125, ALJ Nos. 2003-CAA-8 and 16 (ARB June 30, 2005). [Page 12 and 16]; *Slavin v. UCSB Donald Bren School*, 2005-CAA-11 (ALJ July 14, 2005). [Page 15]

[Nuclear and Environmental Whistleblower Digest III C 4]
TIMELINESS OF COMPLAINT; ALLEGATION OF HOSTILE WORK ENVIRONMENT; DENIAL OF REQUEST FOR RELIEF FROM DISCRIMINATION DOES NOT TOLL THE LIMITATIONS PERIOD

In ***Sasse v. USDOL***, No. 04-3245 (6th Cir. May 31, 2005) (case below ARB No. 02-077, ALJ No. 1998-CAA-7), the Sixth Circuit found that the "hostile work environment" analysis of *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002), as relevant to the question of whether a complaint had been timely filed, was applicable to whistleblower cases arising under the CAA, SWDA and FWPCA. The court agreed with the ARB that none of the employment actions that the Complainant had listed in his complaint had occurred within the applicable 30-day statute of limitations.

The court rejected the Complainant's argument that the time period was tolled by the Respondent's refusal to transfer a secretary away from him (the Complainant having alleged that he had been assigned a "drunken" secretary in an effort to harass him). The court wrote that "[w]e have held that 'the denial of a request for relief from discrimination does not itself constitute a discriminatory act that tolls the statute of limitations.'" (citations omitted).

[Nuclear and Environmental Whistleblower Digest V C 1]
OSHA INVESTIGATION; REMEDY FOR PURPORTED DEFICIENCIES IN INVESTIGATION IS DE NOVO HEARING BEFORE ALJ, NOT A REMAND FOR A NEW INVESTIGATION

In ***Slavin v. UCSB Donald Bren School***, 2005-CAA-11 (ALJ June 8, 2005), the ALJ denied the Complainant's motion for a remand for a new administrative investigation holding that "[e]ven assuming that an investigation was not conducted properly, the due process protection for either side is a fair and impartial de novo hearing before an ALJ. Consequently, as long as the agency addressed and made a determination on the merits of the complaint, as it did in this case, remand is not an appropriate remedy."

[Nuclear and Environmental Whistleblower Digest VII E]
TRIAL OF ISSUE BY IMPLIED CONSENT

In ***Sasse v. USDOL***, No. 04-3245 (6th Cir. May 31, 2005) (case below ARB No. 02-077, ALJ No. 1998-CAA-7), the Sixth Circuit held that the Complainant's suspension, allegedly in retaliation for contacts the Complainant made with a congressman, was not cognizable where the matter arose after the filing of the DOL environmental whistleblower complaint and where the elements of trial by implied consent were not present. The Complainant was an Assistant U.S. Attorney (AUSA). The court looked to FRCP 15(b) for guidance in interpreting the DOL rule on trial by implied consent at 29 C.F.R. § 18.5(e). The mere fact that the Respondent's attorneys asked questions about the contact with the Congressman did not serve to establish that the Respondent had fair notice of a new, unpleaded issue entering the case where the questions were clearly designed to elicit testimony relevant to the Complainant's credbility. The court expressed no opinion on whether an AUSA engages in protected activity by speaking with a Congressman about certain aspects of his job, but limited

its holding to a finding that such was neither pled in the complaint nor tried by the implied consent of the parties.

[Nuclear and Environmental Whistleblower Digest VII E]
COVERAGE; DISTINCTION BETWEEN "JURISDICTION" AND COVERAGE

In ***Devers v. Kaiser-Hill Co.***, ARB No. 03-113, ALJ No. 2001-SWD-3 (ARB Mar. 31, 2005), the ALJ found that the Complainants had not engaged in protected activity and therefore dismissed their complaints for lack of jurisdiction. The ARB clarified that the dismissal was for lack of coverage, not lack of jurisdiction. The Board wrote:

> The ALJ's dismissal of the Complainants' claims for lack of jurisdiction requires some clarification. The complaint filed with OSHA under the ERA, TSCA, SWDA, and CERCLA conferred jurisdiction upon the ALJ to determine whether the Complainants were entitled to relief under one or more of those statutes. *See Bell v. Hood*, 327 U.S. 678, 682 (1946) (whether the complaint states a cause of action on which relief could be granted is a question of law, which must be decided after, and not before, the court has assumed jurisdiction over the controversy; if the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction); *Culligan v. American Heavy Lifting Shipping Co.*, ARB No. 03-46, ALJ Nos. 00-CAA-20, 02-CAA-09, 11, slip op. at 7-11 (ARB June 30, 2004) (ARB has jurisdiction to decide that the complainants' case must be dismissed under the TSCA, SWDA, and CERCLA). Where, as here, the case is fully litigated on the merits, and the ALJ finds and concludes that what the Complainants assert is their protected activity is not in fact protected under the statutes at issue, we consider the question to be one of coverage under those statutes and not of jurisdiction. See Gain v. Las Vegas Metro. Police Dep't, ARB No. 03-108, ALJ No. 02-SWD-4, slip op. at 4 n.5 (ARB June 30, 2004). ...

Slip op. at n.3.

[Nuclear and Environmental Whistleblower Digest VIII A 2 b]
RECORD CITATIONS; NEED FOR ALJ TO CITE PORTIONS OF THE RECORD THAT SUPPORT HIS FINDINGS OF FACT ESPECIALLY CRITICAL IN A COMPLICATED CASE

In ***Hall v. United States Army Dugway Proving Ground***, ARB Nos. 02-108 and 03-013, ALJ No. 1997-SDW-5 (ARB Dec. 30, 2004), most of the ALJ findings of fact did not identify which parts of he record upon which he relied, making review by the Board exceedingly difficult because the trial had lasted 56 days and involved more than 50 witnesses testifying about evidentiary issues spanning a 10 year period. The Board wrote: "Record citations are always essential, both to the ALJ to confine his thinking to the actual record and not to vague recollections, and to the Board, so it may know precisely the basis for the ALJ's fact findings. In a case as complicated as this, those necessities are only magnified."

[Nuclear and Environmental Whistleblower Digest VIII C 2 d]
TIMELINESS OF PETITION FOR REVIEW BY COURT OF APPEALS; DATE OF ISSUANCE RATHER THAN POSTMARK GOVERNS

In ***Dierkes v. USDOL***, 397 F.3d 1246 (9th Cir. 2005) (case below ARB No. 02-001, ALJ No. 2000-TSC-2), the Ninth Circuit held that the time period for petitioning the court for review of an ARB decision under the whistleblower provision of the TSCA runs from the date of "issuance" (i.e., the date printed on the first page of the decision) rather than the postmark. *See* 15 U.S.C. § 2622(c)(1); 29 C.F.R. § 24.8(c).

[Nuclear and Environmental Whistleblower Digest IX B 2 b viii]
LEGITIMATE, NON-DISCRIMINATORY REASON FOR DISCIPLINE; INSUBORBINATION; "LEEWAY FOR IMPLUSIVE BEHAVIOR PRINCIPLE" DOES NOT APPLY TO DELIBERATE AND REASONED SARCASM AND SATIRE IN RAISING COMPLAINTS

In ***Sayre v. Veco Alaska, Inc.***, ARB No. 03-069, ALJ No. 2000-CAA-7 (ARB May 31, 2005), the Complainant argued that the Respondent could not discipline her for the manner in which she engaged in protected activity, arguing that she had been provoked to use sarcasm and satire in her e-mails, and pointing out that she had had not been malicious, or obscene, or violent. The Complainant relied in this respect on *Kenneway v. Matlack, Inc.*, 1988-STA-20, slip op. at 6 (Sec'y June 15, 1989), in which the Secretary had stated that there was leeway for implusive behavior. The ARB noted that it had recently held that this leeway for implusive behavior standard applies to situations where the complainant is emotionally motivated and the conduct is temporary and uncalculated. *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-37, slip op. at 15 (ARB Dec. 31, 2002), *aff'd on other grounds Harrison v. Administrative Review Board*, 390 F.3d 752, 759 (2d Cir. 2004). In contrast, the Complainant's conduct in the instant case was more deliberate and reasoned that implusive and uncalculated -- conduct which does not qualify for the "leeway" principle. Since insubordination toward supervisors and coworkers, even when engaged in protected activity, is justification for termination, the Complainant had properly been disciplined for her discourteous and insubordinate manner.

[Nuclear and Environmental Whistleblower Digest X E 1]
CREDIBILITY DETERMINATIONS; CONCLUSORY FINDING THAT COMPLAINANT WAS CREDIBLE INADEQUATE BASIS FOR EVALUATION OF CONFLICTING EVIDENCE

In ***Hall v. United States Army Dugway Proving Ground***, ARB Nos. 02-108 and 03-013, ALJ No. 1997-SDW-5 (ARB Dec. 30, 2004), the ALJ erred when he made a general and conclusory finding that the Complainant was credible, but did not explicitly evaluate the credibility of 50 other witnesses (40 of whom were adverse to the Complainant). The Board wrote: "[A]n ALJ may not evade his responsibility to evaluate conflicting testimony by many witnesses on various disputed issues of fact by the expedient of decreeing the complainant as the most credible witness on any issue." Slip op. at 29 (citation omitted).

[Nuclear and Environmental Whistleblower Digest X P]
ADVERSE INFERENCE RULE; UNCALLED WITNESS' TESTIMONY MUST HAVE TENDED TO THROW LIGHT ON THE ISSUES

In ***Hall v. United States Army Dugway Proving Ground***, ARB Nos. 02-108 and 03-013, ALJ No. 1997-SDW-5 (ARB Dec. 30, 2004), the ALJ erred when he drew an adverse inference against the Respondent when it did not call a General as a witness to rebut certain testimony of the Complainant concerning whether the Complainant had been informed that the General had called him a traitor. The Board found that there was testimony by other witnesses rebutting the Complainant's version of the event and that the General could have only testified as to whether he ever called the Complainant a traitor in a place where the person who purportedly told the Complainant of the comment may have overheard the remark. The Board stated that "the adverse inference rule applies when, among other reasons, 'there exists an unexplained failure or refusal of a party . . . to produce evidence that would tend to throw light on the issues.' *Gilbert v. Cosco Inc.*, 989 F.2d 399, 405-406 (10th Cir. 1993) (internal quotations omitted) and cases cited therein." Slip op. at 28. The Board found that the General's testimony would not have tended to throw light on the conflicting testimony.

[Nuclear and Environmental Whistleblower Digest X P]
PURPOSE OF WHISTLEBLOWER PROTECTION; NO SPECIAL DUTY OF CARE TO EMPLOYEES WITH PRE-EXISTING PROBLEMS

In ***Hall v. United States Army Dugway Proving Ground***, ARB Nos. 02-108 and 03-013, ALJ No. 1997-SDW-5 (ARB Dec. 30, 2004), the ALJ erred when he placed an affirmative burden on the Respondent to accommodate the Complainant's performance problems based on a theory that employers take employees on an "as is" basis and will be responsible for aggravation of exacerbation of pre-existing problems. The Board held that the whistleblower protections only prohibit employers from discriminating against whistleblowers; they do not require such favorable treatment.

[Nuclear and Environmental Whistleblower Digest XI B 2 b ix]
CAUSATION; TERMINATION FOR GOING OUTSIDE CHAIN OF COMMAND ONLY UNLAWFUL WHERE THE RESPONDENT HAD BEEN UNRESPONSIVE TO SAFETY CONCERNS OR WHERE THE COMPLAINANT REASONABLY FEARED REPRISAL

In ***Sayre v. Veco Alaska, Inc.***, ARB No. 03-069, ALJ No. 2000-CAA-7 (ARB May 31, 2005), the Complainant had been terminated for creating hostility with co-workers. One of the ways cited by the supervisor who made the termination decision in which hostility had been created was the Complainant's practice of telling the company with which her employer had been contracted to supply engineering services about her safety concerns rather than her employer directly. The Complainant argued that she had been unlawfully terminated under *Dutkiewicz v. Clean Harbors Envtl. Servs, Inc.*, ARB No. 07-090, ALJ No. 1995-STA-34, slip op. at 7 (ARB Aug. 8, 1997), *aff'd sub nom., Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 24 (1st Cir. 1998), in which the Board had held that "an adverse action taken because an employee circumvented the chain of command to raise a safety issue would violate the

employee protection provision." The Board rejected this argument and distinguished *Dutkiewicz*: "The environmental whistleblower protections do not deprive employers of the right to require employees to tell them immediately about hazardous conditions. This is not a case in which the employee expressed protected safety or environmental concerns outside the chain of command because the company had been unresponsive to the employee's complaints or because the employee reasonably feared reprisals if she took her concerns to supervisors." *Sayre*, slip op. at 11 (citation omitted).

[Nuclear and Environmental Whistleblower Digest XI E 6]
COMPLAINANT'S BURDEN OF PROOF BY THE PREPONDERANCE OF THE EVIDENCE; ALJ ERRS IN RESOLVING DOUBTS IN FAVOR OF THE COMPLAINANT

In ***Hall v. United States Army Dugway Proving Ground***, ARB Nos. 02-108 and 03-013, ALJ No. 1997-SDW-5 (ARB Dec. 30, 2004), the ALJ erred when he resolved all doubts in favor of the Complainant. The ARB reiterated that "the preponderance of the evidence standard requires that the employee's evidence persuades the ALJ that his version of events is more likely true than the employer's version. Evidence meets the 'preponderance of the evidence' standard when it is more likely than not that a certain proposition is true. *Masek v. The Cadle Co.*, ARB No. 97-069, ALJ No. 95-WPC-1, slip op. at 7 (ARB Apr. 28, 2000)." Slip op. at 27. The Board stated that "[i]f the ALJ is doubtful about whether to believe the employee's evidence, he must resolve the doubt against the employee, not against the employer." Slip op. at 27 (citation omitted).

[Nuclear and Environmental Whistleblower Digest XII A]
EXTENT TO WHICH DECISION MAKER MUST DETERMINE PROTECTED ACTIVITY UNDER VARIOUS STATUTES PLEADED

In ***Hall v. United States Army Dugway Proving Ground***, ARB Nos. 02-108 and 03-013, ALJ No. 1997-SDW-5 (ARB Dec. 30, 2004), once the ARB determined that the Complainant engaged in protected activity under the SWDA, it found it unnecessary to determine whether other environmental whistleblower statutes pleaded by the Complainant applied.

[Nuclear and Environmental Whistleblower Digest XII B 18]
ADVERSE EMPLOYMENT ACTION; REPRIMAND THAT IS LATER USED TO JUSTIFY A SUSPENSION OR TERMINATION IS ADVERSE EMPLOYMENT ACTION

In ***Sayre v. Veco Alaska, Inc.***, ARB No. 03-069, ALJ No. 2000-CAA-7 (ARB May 31, 2005), one of the Respondents contended that a written reprimand advising the Complainant that she must show improvement in working with her colleagues, communicating with her supervisor and following procedures, was not an adverse employment action under *Shelton v. Oak Ridge Nat'l Labs.*, ARB No. 98-100, ALJ No. 1995-CAA-19 (ARB Mar. 30, 2001). In *Shelton*, the Board had held that written criticism is not adverse action unless it directly causes a tangible job consequence, such as loss of pay. In the instant case, the Board held that the reprimand was an adverse action because there was a connection between the reprimand and a later suspension without pay and eventual termination. Evidence in the record established

that the previous reprimand had been used as a ground for the later suspension and termination.

[Nuclear and Environmental Whistleblower Digest XII C 4]
PROTECTED ACTIVITY; EMPLOYEE'S REASONABLE BELIEF OF EXISTENCE OF ENVIRONMENTAL HAZARD

In ***Hall v. United States Army Dugway Proving Ground***, ARB Nos. 02-108 and 03-013, ALJ No. 1997-SDW-5 (ARB Dec. 30, 2004), the ARB rejected the Respondent's assertion that the Complainant's complaints about environmental hazards were not protected activity because they did not specify violations of the federal environmental laws. The Board wrote: "An employee engages in protected activity when he reports actions that he reasonably believes constitute environmental hazards, irrespective of whether it is ultimately determined that the employer's actions violate a particular environmental statute. *Oliver v. Hydro-Vac Services, Inc.,* No. 91-SWD-00001, slip op. at 9 (Sec'y Nov. 1, 1995)." Slip op. at 5.

[Nuclear and Environmental Whistleblower Digest XII C 6
PROTECTED ACTIVITY; MANNER OF RAISING; DELIBERATE AND REASONED SARCASM AND SATIRE IS NOT THE TYPE OF CONDUCT PROTECTED BY THE "LEEWAY FOR IMPLUSIVE BEHAVIOR" PRINCIPLE

See ***Sayre v. Veco Alaska, Inc.***, ARB No. 03-069, ALJ No. 2000-CAA-7 (ARB May 31, 2005), *supra* at Digest IX B 2 b viii.

[Nuclear and Environmental Whistleblower Digest XII D 13]
PROTECTED ACTIVITY; GOVERNMENT EMPLOYEE PERFORMING JOB DUTIES RELATED TO THE ENVIRONMENT

In ***Sasse v. USDOL***, No. 04-3245 (6th Cir. May 31, 2005) (case below ARB No. 02-077, ALJ No. 1998-CAA-7), the Sixth Circuit held that an Assistant U.S. Attorney could not state a claim under the whistleblower provisions of the CAA, SWDA, and FWPCA premised on his investigation and prosecution of environmental crimes because he was merely performing his assigned job duties. The court cited the reasoning of *Willis v. Dept. of Agriculture*, 141 F.3d 1139, 1145 (Fed. Cir. 1998), a case arising under the Whistleblower Protection Act, as equally applicable to the whistleblower provisions at issue in ***Sasse***. Essentially, the whistleblower provisions protect those who risk their job security by taking steps to protect the public good; an employee who is merely performing duties required of him in a job cannot be said to have risked his personal job security, and has not engaged in protected activities.

[Nuclear and Environmental Whistleblower Digest XII D 13]
PROTECTED ACTIVITY; STATE LAW AUTHORIZED BY THE FEDERAL SWDA

In ***Hall v. United States Army Dugway Proving Ground***, ARB Nos. 02-108 and 03-013, ALJ No. 1997-SDW-5 (ARB Dec. 30, 2004), the ARB rejected the Respondent's assertion that the federal environmental whistleblower acts do not apply to conditions regulated by states, where the state's Solid and Hazardous Waste Act was a state SWDA plan that the federal SWDA authorized.

[Nuclear and Environmental Whistleblower Digest XII D 13]
PROTECTED ACTIVITY; THE SWDA COVERS BOTH ENVIRONMENTAL AND OCCUPATIONAL SAFETY

In ***Hall v. United States Army Dugway Proving Ground***, ARB Nos. 02-108 and 03-013, ALJ No. 1997-SDW-5 (ARB Dec. 30, 2004), the Complainant had filed a written complaint about skin contact with objects contaminated with SWDA-related hazardous chemicals. The ARB rejected the Respondent's contention that this was not protected activity because the SWDA does not cover skin contact. The Board wrote that "Hazards relating to skin contact are occupational safety hazards. SWDA deals with environmental and occupational safety. 42 U.S.C.A. § 6971(f)." Slip op. at n.4.

[Nuclear and Environmental Whistleblower Digest XIII B 18]
ADVERSE EMPLOYMENT ACTION; DOL DOES NOT HAVE THE AUTHORITY TO SECOND GUESS A FEDERAL AGENCY'S DECISION TO REVOKE A SECURITY CLEARANCE

In ***Hall v. United States Army Dugway Proving Ground***, ARB Nos. 02-108 and 03-013, ALJ No. 1997-SDW-5 (ARB Dec. 30, 2004), the ALJ had found that the Respondent took hostile action against the Complainant when it required him to undergo a new background investigation. The Complainant was a chemist with access to warfare agents required to maintain a valid security clearance. The ARB held that it does not have the authority to review the Respondent's reasons for recommending that the Complainant's security clearance be revoked, citing *Dept. of the Army v. Egan*, 484 U.S. 518 (1988). Although *Egan* involved the Civil Service Reform Act, the Board found that it was consistently applied by the courts in anti-discrimination legislation. The Board found that such courts had held that "in the absence of express statutory authority to review security clearance decisions, review of the employee's claim that the clearance process was discriminatory would violate the principles of *Egan.* The courts reasoned that they could not properly determine whether an agency decision affecting an employee's security clearance was a pretext for discrimination without evaluating the agency's reasons for changing the security clearance. And evaluating an agency's reasoning pertaining to security clearance decisions amounts to second guessing the agency, which is precisely what *Egan* prohibits." Slip op. at 17.

[Nuclear and Environmental Whistleblower Digest XIII C]
HOSTILE WORK ENVIRONMENT; CONSTRUCTIVE DISCHARGE; GENERAL PRINCIPLES

In ***Hall v. United States Army Dugway Proving Ground***, ARB Nos. 02-108 and 03-013, ALJ No. 1997-SDW-5 (ARB Dec. 30, 2004), the ARB restated the law regarding hostile work environment and constructive discharge. The Board wrote:

> The term "discrimination" in the environmental whistleblower provisions carries the same meaning as the term "unlawful employment practice" in Title VII of the Civil Rights Act of 1964. *Cf. Sasse v. Office of the United States Attorney*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 98-CAA-7, slip op. at 34 (ARB Jan. 30, 2004). An "unlawful employment practice" includes a hostile work environment.

> *Id.* A hostile work environment exists when supervisors or co-workers engage in hostile acts that do not tangibly alter the victim's conditions of employment, such as salary or promotion opportunity, but are sufficiently severe or pervasive to create an abusive work environment. *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 67 (1986). A constructive discharge "can be regarded as an aggravated case of . . . hostile work environment." *Pennsylvania State Police v. Suders,* __ U.S. __, 124 S.Ct. 2342, 2354 (2004).
>
> To establish that Dugway subjected him to a hostile work environment, Hall must prove by a preponderance of the evidence that: (1) he engaged in protected activity of which Dugway was aware; (2) Dugway intentionally harassed him because of that activity; (3) the harassment was sufficiently severe or pervasive so as to alter the conditions of Hall's employment and to create an abusive working environment; and (4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect Hall. *See Sasse,* slip op. at 34 and cases cited therein. Only then would Hall have a basis for arguing that the work environment was so far beyond "ordinary discrimination" that it amounted to a constructive discharge. *See Suders*, 124 U.S. at 2354.
>
> A court may consider all of the purported hostile acts in determining liability if at least one of them occurred within the statutory filing period. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002). Therefore, for us to consider all of the hostile acts Hall alleges, he must establish that at least one of them occurred within thirty days of February 13, 1997, when he filed his complaint, since the five environmental whistleblower statutes require that the complaint be filed within thirty days of the employer's "discriminatory" action.

Slip op. at 3-4 (footnote omitted).

[Nuclear and Environmental Whistleblower Digest XIII C]
HOSTILE WORK ENVIRONMENT NOT ESTABLISHED BY OFFHAND COMMENTS OR ISOLATED INCIDENTS, UNLESS EXTREMELY SERIOUS

In ***Hall v. United States Army Dugway Proving Ground***, ARB Nos. 02-108 and 03-013, ALJ No. 1997-SDW-5 (ARB Dec. 30, 2004), the ARB found that substantial evidence did not support the ALJ's finding that a Commander Lieutenant Colonel had told the Complainant that a Commanding General had once called the Complainant a traitor because of the Complainant's environmental complaints. The Board also made an alternative finding that even if the Lieutentant Colonel had made the comment, the Complainant failed to prove that he perceived the comment as hostile at the time or that a reasonable person would have perceived it as hostile. The Board wrote:

> "Offhand comments and isolated incidents (unless extremely serious)" and "merely offensive utterances" are not the stuff of which hostile work environments are made. *Faragher v. City of Boca Raton*, 524

> U.S. 775, 787-788 (1998). The "objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Id.*, 524 U.S. at 787; *see also Sasse v. Office of the United States Attorney*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 98-CAA-7, slip op. at 34 (ARB Jan. 30, 2004).

[Nuclear and Environmental Whistleblower Digest XIII C]
HOSTILE WORK ENVIRONMENT; REQUIREMENT OF REPORTING SAFETY COMPLAINTS THROUGH CHAIN OF COMMAND IS NOT IMPROPER IF THE COMPLAINANT REMAINS FREE TO REPORT OUTSIDE THE CHAIN OF COMMAND

In ***Hall v. United States Army Dugway Proving Ground***, ARB Nos. 02-108 and 03-013, ALJ No. 1997-SDW-5 (ARB Dec. 30, 2004), the ALJ found that a commanding Lieutenant Colonel had counseled the Complainant that he should not be testifying to Congress or to compliance agencies such as the State or EPA, or even to the Dugway legal office, about his environmental safety concerns without first going to his management and giving them the information." The ALJ concluded that this was a gag order imposed as part of a hostile work environment. The ARB found that the record did not support the ALJ's finding, concluding instead that that the Lieutenant Colonel had merely instructed the Complainant to follow the chain of command and that he was also free to report outside the chain of command. In a footnote, the Board clarified its holdings on reporting through the chain of command:

> It is true that we have stated that "an employer may not, with impunity, discipline an employee for failing to follow the chain-of-command, failing to conform to established channels or circumventing a superior." *Talbert v. Washington Pub. Power Supply Sys.,* ARB No. 96-023, ALJ No. 93-ERA-35 (ARB Sept. 27, 1996). But this statement should not be understood to mean that employers have no right to require employees to tell them immediately about hazardous conditions. *Cf. Saporito v. Florida Power & Light Co.,* Nos. 89-ERA-7, 89-ERA-17, slip op. at 2 (Sec'y Feb. 16, 1995) (Energy Reorganization Act whistleblower provision does not prohibit employers from requiring employees to report safety hazards immediately to the plant operator); *Jones v. E G & G Def. Materials, Inc.,* ARB No. 97-129, ALJ No. 95-CAA-3, slip op. at 13-14 (ARB Dec. 24, 1998) (important goal of whistleblower provisions is to encourage front-line employees to bring their unique knowledge of workplace hazards to supervisors and the chain of command so that persons in authority can take corrective action quickly). At the same time, an employer may not rely on its chain of command policy as a pretext for disciplining an employee who reports safety concerns outside the chain of command. *Cf. Pogue v. United States Dep't of Labor,* 940 F.2d 1287 (9th Cir. 1991) (upholding ALJ finding that supervisor's testimony that he punished complainant because she did not follow his instructions to communicate through the "chain of command" was pretext).

Slip op. at n.15.

[Nuclear and Environmental Whistleblower Digest XIV B 2]
INDIVIDUALS AS RESPONDENTS; LACK OF EMPLOYMENT RELATIONSHIP

In ***Powers v. Tennessee Dept. of Environmental & Conservation***, ARB Nos. 03-061 and 03-125, ALJ Nos. 2003-CAA-8 and 16 (ARB June 30, 2005), the ARB affirmed the ALJ's holding that it was too late for the Complainant to amend her complaint to add state officials and a private company as respondents almost five months after she filed her complaint.

In a second complaint the ARB affirmed the ALJ's denial of amendment of the complaint to add two state attorneys as respondents (albeit not for the reasons proffered by the ALJ), on the ground that merely alleging that the attorneys were "key participants" in the Complainant's alleged blacklisting and firing falls short of the legal requirement that the Complainant have an employment relationship with those individuals as respondent employers – i.e., since neither was her employer, she could not prevail against them as a matter of law.

[Nuclear and Environmental Whistleblower Digest XIV B 4 E]
COVERED EMPLOYER OF EPA EMPLOYEE; OFFICE OF INSPECTOR GENERAL; DEPARTMENT OF THE ARMY

In ***Fox v. U.S. Environmental Protection Agency***, 2004-CAA-4 and 10, 2005-CAA-6 (ALJ Mar. 1, 2005), *recon. denied* (ALJ Mar. 15, 2005), the EPA Office of Inspector General's filed a motion for summary decision dismissing it as a Respondent because it exercised no supervisory control over the Complainant and exercises considerable independence from EPA. The ALJ agreed, citing in support *Greene v. U.S. Environmental Protection Agency*, 2002-SWD-1, slip op. at 6 (ALJ Feb. 10, 2003), *aff'd without reaching this issue* (ARB June 14, 2005).

In contrast, the ALJ denied a similar motion from the Department of the Army. The Complainant was an EPA employee, but had been loaned to Georgia Tech University under an Intergovernmental Personnel Act assignment. The University had been awarded money from the Department of the Army to perform tasks under a Watershed Advisory Board; the Complainant was made the project manager. The ALJ found that there was sufficient evidence in conflict regarding whether the Army exercised control over the Complainant's employment so as to avoid summary decision on the issue of whether the Army was a "statutory employer."

[Nuclear and Environmental Whistleblower Digest XVI A]
INTERLOCUTORY APPEAL; BIFRUCATED HEARING

In ***Walsh v. Resource Consultants, Inc.***, ARB No. 05-123, ALJ No. 2004-TSC-1 (ARB Aug. 10, 2005), the ALJ had issued a recommended decision on the merits, reserving the damages issues for additional briefing and consideration. The ALJ's decision included a notice of appeal rights, and the Respondent filed a appeal. Later, the parties filed a joint motion recognizing that the ALJ's order was interlocutory and not yet ripe for review, and requesting that the matter be remanded to the ALJ for calculation of damages and attorney's fees. The ARB granted the motion.

[Nuclear and Environmental Whistleblower Digest XVI D 4 d]
DAMAGES; TAXATION; AWARD OF COMPENSATORY DAMAGES FOR EMOTIONAL DISTRESS AND DAMAGE TO REPUTATION NOT EXEMPT UNDER I.R.C. § 104(a)(2)

In ***Murphy v. I.R.S.***, No. 03-02414 (D.D.C. Mar. 22, 2005) (related to *Leveille v. New York Air National Guard*, ARB No. 98-079, ALJ Nos. 1994-TSC-3 and 4), the District Court for the District of Columbia held that I.R.C. § 104(a)(2) does not exempt from taxation a compensatory damages award for emotional distress and damage to reputation in an environmental whistleblower case. The court wrote:

> Here, Murphy's mental anguish manifested into a physical problem, bruxism, but this was only a symptom of her emotional distress, not the source of her claim. Plaintiff's emotional distress is not "attributable to her physical injury; in fact, it is the other way around. Because the statute clearly provides damages must be received "on account of personal physical injury or physical sickness," and because mental pain and anguish and damage to reputation are not physical injuries, plaintiff's emotional distress damages are not included within the statutory exemption under § 104(a)(2).

[Nuclear and Environmental Whistleblower Digest XVII G 9]
SETTLEMENT JUDGE PROGRAM REQUIRES VOLUNTARY PARTICIPATION OF ALL PARTIES; ALJ CANNOT COMPEL

OALJ's settlement judge procedure requires a joint motion from the parties; an ALJ cannot compel participation in the settlement judge program. ***Slavin v. UCSB Donald Bren School***, 2005-CAA-11 (ALJ June 8, 2005).

[Nuclear and Environmental Whistleblower Digest XVIII B 1 b]
TIMELINESS OF PETITION FOR ARB REVIEW; EVEN IF THE ALJ'S DECISION IS SHOWN NOT TO HAVE BEEN MAILED ON THE DATE SHOWN ON THE FACE OF THE DECISION, A PETITIONER IS REQUIRED TO FILE THE PETITION FOR REVIEW DILIGENTLY UPON RECEIPT OF THE DECISION

In ***Immanuel v. C&D Concrete***, ARB No. 05-006, 2003-CAA-18 (ARB Jan. 27, 2005), the ALJ's recommended decision was dated September 10, 2004 on the first page of the decision and on the service sheet, but the Complainant averred that the copy sent to his counsel bore the metered postmark of September 24, 2004. The Complainant's counsel averred that he received the ALJ's decision on September 30, 2004. The Complainant filed his petition for ARB review on October 15, 2004. The ARB issued an Order to Show Cause why the appeal should not be dismissed as untimely. The Board conceded that it would be inequitable to calculate the 10 day period for appealing from the date shown on the ALJ's decision as it was not mailed until later. The Board nevertheless dismissed the petition because it was not persuaded that the Complainant's counsel diligently pursued the appeal once he received the decision, but unilaterally decided that he had ten business days from

the date he received the ALJ's decision to file the petition for review. The Board found that the petition was due 10 days following the metered postmark.

[Nuclear and Environmental Whistleblower Digest XVIII B 1 b]
TIMELINESS OF PETITION FOR ARB REVIEW; AMIGUOUS CIRCUMSTANCES INSUFFICIENT TO ESTABLISH EQUITABLE GROUNDS FOR RELIEF FROM AN UNTIMELY FILING

In ***Greene v. U.S. Environmental Protection Agency***, ARB No. 03-094, ALJ No. 2002-SWD-1 (ARB June 14, 2005), the ALJ issued a recommended order granting summary judgment in favor of the Respondent, and attached thereto a certificate of service attesting that the Chief Docket Clerk had sent a copy of that document to the Complainant. The address shown on the certificate was the Complainant's correct address. The applicable regulation provides a ten-business day limitations period for filing a petition for review with the ARB; the Complainant did not file a petition until several months after the issuance of the ALJ's recommended decision, alleging that she had not learned of the ALJ's decision until her attorney saw it on the Internet. The ARB, therefore, considered whether equitable considerations applied to excuse the untimely petition for review. The ARB, noting that the Complainant was a retired ALJ who presumably would chose words in a declaration carefully, found that the Complainant only alleged that she did not see the ALJ's decision until it was sent to her by her attorney; she did not swear that the decision was never delivered to her post office box. In this regard, the Board noted that the Respondent had essentially stated that it would concede that the appeal was timely if the Complainant would submit an unambiguous affidavit swearing under oath that she diligently checked her mail and the recommended decision was never delivered to her post office box. The Board found that the Complainant had not established that exceptional circumstances precluded her from timely filing a petition for review.

[Nuclear and Environmental Whistleblower Digest XVIII C 9]
DISMISSAL OF APPEAL; MOOTNESS; JURISDICTION

In ***Edmonds v. Tennessee Valley Authority***, ARB No. 05-002, ALJ No. 2004-CAA-15 (ARB July 22, 2005), the Complainant requested the ARB to review a letter from the Chief ALJ responding to a FOIA request filed by the Complainant's counsel. In the letter, the Chief ALJ had responded to the FOIA request, but informed the Complainant that his counsel would not be permitted to file future FOIA requests on his behalf because of an order issued by the Associate Chief ALJ denying that attorney the right to represent parties before OALJ. The ARB issued an order directing the Complainant to demonstrate why his request was not moot given the Board's affirmance of the Associate Chief ALJ's order. (The Board also expressed doubt that it had the authority to review the Chief ALJ's letter at all). The Complainant did not respond and the ARB consequently dismissed the appeal.

[Nuclear and Environmental Whistleblower Digest XX E]
STATE SOVEREIGN IMMUNITY; IMPACT OF *HIBBS*; LEGISLATIVE HISTORY; ACCEPTANCE OF FEDERAL FUNDING; DETRIMENTAL RELIANCE

In ***Powers v. Tennessee Dept. of Environmental & Conservation***, ARB Nos. 03-061 and 03-125, ALJ Nos. 2003-CAA-8 and 16 (ARB June 30, 2005), the Complainant argued that the Supreme Court's decision in *Nevada Dept. of Human*

Res. v. Hibbs, 538 U.S. 721 (2003), holding that state employees may recover money damages in federal court for violations of the Family and Medical Leave Act compels a reversal of ARB precedents holding that state sovereign immunity precludes adjudication of environmental whistleblower complaints before DOL. The Board, however, found that *Hibbs* fully supported its prior holdings – "[w]hile CERCLA, SWDA, TSCA, FWPCA, SDWA, and CAA may require states to comply with the regulatory provisions of those acts, they do not provide for private rights of action for money damages against states and state agencies." ***Powers***, slip op. at 7.

The Board also rejected the Complainant's argument that a waiver of sovereign immunity in CERCLA cases is supported by the legislative history of that act. The Board wrote: "[T]he Supreme Court has made it clear that the legislative history cannot supply an abrogation that does not appear clearly in the statute itself. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000)…."

The Board likewise rejected the Complainant's argument that Tennessee had waived sovereign immunity when it accepted millions of dollars of federal funds for environmental programs, the Complainant having failed to identify any statutory language that could be construed as conditioning federal funding on waiver.

Finally, the Board rejected the Complainant's argument that equitable estoppel should prevent the State Respondents from asserting sovereign immunity, the Board noting precedent from a Service Contract Act decision of the Secretary to the effect that estoppel would require demonstration that the government official made false representations with the intent that the complainant would rely on them, coupled with affirmative misconduct. The Board found that such circumstances were not present in the instant case (especially since the Complainant was arguing that she relied on the opinion of an EPA official rather than any State Respondent employee).

[Nuclear and Environmental Whistleblower Digest XX E]
STATE SOVEREIGN IMMUNITY; POTENTIAL LIABILITY OF OFFICIAL IN INDIVIDUAL CAPACITY; CANNOT AMEND COMPLAINT TO ADD CURRENT HOLDER OF OFFICE MERELY FOR PURPOSE OF DEFEATING IMMUNITY

In ***Slavin v. UCSB Donald Bren School***, 2005-CAA-11 (ALJ July 14, 2005), the ALJ granted summary decision to the University of California on the ground that it was immune from suit under the state sovereign immunity provided by the Eleventh Amendment to the U.S. Constitution. The ALJ, however, did not dismiss the person who was Dean of the school at the relevant time. The ALJ found that it was unclear whether the attorney for the Respondent was also representing the Dean or the University of California alone, and therefore ordered that the attorney provide notice of the scope of his representation. The ALJ observed that the Dean named as a Respondent was no longer employed by the University, and therefore equitable releif was not available to the Complainant, and the only remaining relief would be monetary.

The Complainant subsequently moved to amend his complaint to add the current Dean as an indispensable party. The ALJ denied the motion because the Complainant made no showing that the current Dean had any role in the alleged discrimination which would make him liable in his individual capacity. ***Slavin v.***

UCSB Donald Bren School, 2005-CAA-11 (ALJ Aug. 2, 2005). The ALJ therefore concluded that the only basis for adding the current Dean as a party would be in his capacity as a state official. The ALJ wrote: "To allow a private party to circumvent state sovereign immunity by simply adding as a party whatever state official happens to be in a position of authority at the time of the litigation (vs the time of the alleged wrongdoing) would frustrate that Constitutional principle." Slip op. at 3 (footnote omitted).

[Nuclear and Environmental Whistleblower Digest XX E]
AMENDMENT OF COMPLAINT TO ADD PARTIES TO AVOID EFFECTS OF STATE SOVEREIGN IMMUNITY

See ***Powers v. Tennessee Dept. of Environmental & Conservation***, ARB Nos. 03-061 and 03-125, ALJ Nos. 2003-CAA-8 and 16 (ARB June 30, 2005), *supra* at Digest XIV B B 2.